STATE OF MICHIGAN IN THE MICHIGAN SUPREME COURT

(On Appeal from the Oakland County Circuit Court and the Michigan Court of Appeals)

DOUGLAS LATHAM,

Plaintiff-Appellee,

MSC Docket No. 148929

COA Docket Nos. 312141 & 313606

Lower Court No. 04-059653-NO

BARTON MALOW CO.,

Defendant-Appellant.

DEFENDANT BARTON MALOW COMPANY'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

148928

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FILED

MAY 2 7 2014

LARRY S. ROYSTER
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MICHIGAN SUPREME COURT

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REPLY BRIEF

Plaintiff's brief in response to Defendant's application for leave to appeal confirms the necessity of this Court's intervention. Although this Court has to sift through significant hyperbole, Plaintiff's brief leaves no doubt that the issues presented in this appeal are of substantial importance to Michigan jurisprudence. Defendant reiterates its request that this Honorable Court grant its application for leave to appeal and reverse the lower courts.

Response to Plaintiff's Statement Regarding Leave

Plaintiff devotes nine pages as to why this Court should not grant leave to appeal (Plaintiff's brief, iv-xiii). This demonstrates just how significant and important the common work area is to both the litigants and Michigan law as a whole. The gravamen of Plaintiff's briefing at all levels is that it would prefer that this Court have not narrowed the scope of the common work area exception over the years, such as in *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004). However, the *Ormsby* decision did, in fact, carve away aspects of the common work area first appearing in *Funk v General Motors Corporation*, 392 Mich 91; 220 NW2d 641 (1974). It may be that the facts of *Funk* would not satisfy the common work area exception today. This is nothing new under the common law. The common law is dynamic.

This Court entertained argument in this case several years ago to address the contours of how the significant number of workers should be determined and counted. Ultimately, this Court declined to provide further guidance regarding same, as it was able to reverse the lower courts' errors without doing so. In the absence of guidance, the lower courts continue to err. The unmistakable conclusion is that this area of law needs to be clarified for the current parties and all future parties. Plaintiff's brief is replete with references to public policy arguments. This Court is the proper court to make public policy decisions regarding important common law

principles. Further guidance regarding the common work area exceptions is overdue. Defendant respectfully reiterates that this Court should grant leave to appeal, and with the benefit of amicus briefing, provide guidance to the bench and bar regarding the common work area exception.

Response to Plaintiff's Counter-Statement of Facts

Plaintiff contends that Defendant's Statement of Facts omitted facts. However, Defendant confined itself to the <u>material</u> facts and declined to follow Plaintiff into his factual "red herrings." Moreover, it only took three pages for Plaintiff to add what it deemed missing, none of which has any bearing on the issues raised on appeal. For example, Plaintiff devotes Page 3 of his brief to the "safety cable" (Plaintiff's brief, 3). This case has never been about the "safety cable." Instead, it is about personal fall protection while working on (if not merely accessing) an elevation—which could not even happen until the safety cable was taken down.

Next Plaintiff devotes ample space to scissor lift qualifications and anchorage points (which was not even mentioned in the record before the first appeal was taken). But, as set forth in considerable detail in Defendant's brief, Plaintiff's expert conceded that Plaintiff did not require personal fall protection while riding the scissor lift (Tr IV, 173). Plaintiff's expert further confirmed that no fall protection was required while Plaintiff was working on the mezzanine because it would "impede the work operation" (Tr IV, 177). Of course, riding the scissor lift was further unnecessary because Plaintiff could have used an articulating forklift to place the drywall safely in the center of the mezzanine area (Tr IV, 183). In addition, the evidence was uncontroverted that all the other trades accessed the elevations by ladder—which does not require fall protection (Tr II, 148). Plaintiff even used a ladder to access the first elevation on this job site (Tr IV, 55, 71). There were many other options for Plaintiff to use, all of which would not have required fall protection.

It bears repeating that Plaintiff's expert confirmed that no fall protection was required while Plaintiff was working on the mezzanine (Tr IV, 177). On page 5 of Plaintiff's brief, he runs through a list of trades that would have worked on the mezzanine. But, as noted above, the prior workers on the mezzanine accessed by ladder—thus, no fall protection was required for them to access (Tr II, 148) or work on the mezzanine (Tr IV, 177). Nevertheless, these workers were erroneously and unfairly counted as workers exposed to the same danger as Plaintiff. This is why Defendant should have been entitled to relief as a matter of law, either via summary disposition, directed verdict, JNOV motion, or all three.

Response to the Construction Manager Issue (Issue I)

Plaintiff was able to persuade the lower courts to accept the absurd contention that the only difference between a construction manager and general contractor is the title. It is disappointing that the lower courts did not recognize that they are different <u>roles</u> (and have been for fifty years). In fact, with some construction jobs, there will be both a general contractor and construction manager! If the lower courts are correct that there is no distinction between a general contractor and construction manager, this means that there would be two entities subject to liability under the common work area exception on some construction projects.

But even where an owner hires one of either a general contractor or a construction manager, the mere fact that there are some overlapping duties between the two roles does not allow a court to blur the distinction between the two roles. In addition to the expert testimony

¹ See e.g. Chrysler Realty Co, LLC v Design Forum Architects, Inc, 544 F Supp 2d 609, 610 (ED MI, 2009) ("Plaintiff retained Lusardi Construction Company as general contractor and the Jordan Company as the construction manager."); In re E.C. Ernst, Inc, 23 BR 204, 205 (SD NY, 1982); Payne v Beef Products, Inc, 2010 US Dist LEXIS 110158 (D Neb, 2010); Leppo v Jacobs Facilities, Inc, 2010 US Dist LEXIS 79639 (D Md, 2010); Cont'l Fin Co v Ledwith, 2009 US Dist LEXIS 52618 (SD NY, 2009).

below, there are numerous articles discussing the vast differences between a general contractor and a construction manager.² At a minimum, this Court should grant leave to appeal and invite amicus briefing regarding these differences before approving the lower courts' blanket elimination of the distinction between construction manager and general contractor roles. As a matter of law, such a public policy decision should only be made with all interested entities³ being given an opportunity to explain their positions.

As it relates to this case, long before Plaintiff appeared on the construction site for his one-week stint of employment, Defendant entered into a contract with the owner of property to serve as a construction manager with limited responsibility over the trades hired by the owner. Unlike a general contractor that directly hires and supervises a subcontractor, Defendant was not given complete authority over the trades hired directly by the owner. Plaintiff does not, because he cannot, cite a published case from this Court or the Court of Appeals ruling that a construction manager is a *de facto* general contractor for purposes of the common work area exception.

In fact, the most indepth analysis of this issue was in *Ormsby*, where this Court considered whether the "common work area" exception could apply to a non-general contractor, Capital Welding, Inc ("Capital"). *Id.* at 56-57. This Court rejected that argument, noting that the exception "is simply inapplicable to Capital in this case because Capital was neither the property owner nor the general contractor." *Id.* at 58. The dissenting opinion noted that Capital, despite

As examples, Defendant includes two of these materials as exhibits to this reply brief. See www.healthdesign.org/sites/default/files/an_owners_guide_to_construction_management.pdf (Ex A); www.trigoninc.com/CM%20vs%20GC%207pages.pdf (Ex B).

This Court should certainly not presume that the skilled trades want a construction manager to be deemed the equivalent of a general contractor. A general contractor hires the mason to perform masonry work as a subcontractor; thus, the general contractor having direct supervisory control over the masonry work is expected. When an owner uses a construction manager, the owner directly hires the mason and the mason is not a subcontractor. The construction manager is in a position, therefore, to interfere with the mason's contractual obligations with the owner.

not being a "general contractor," engaged in the following activities: (i) contracting with the subcontractor (Abray) that employed the plaintiff; (ii) instructing Abray how to perform its work; (iii) instructing the plaintiff how to perform the work; (iv) incurring the contractual obligation to "undertake safety precautions"; and (v) retaining the authority to remove a subcontractor from the work site for deviating from safety procedures. *Id.* at 63-65.

Here, Defendant is, like Capital, not an owner or general contractor. But, unlike Capital, Defendant did not contract with Plaintiff's employer. There is no evidence that Defendant instructed Plaintiff or his employer regarding how to perform its work. This is not a matter of titles. This is a matter of roles and relationships. Defendant's role and relationship fell short of Capital's role in *Ormsby*. The lower courts have erred in ruling that, as a matter of law, Defendant should be held to the same standard as a general contractor. Indeed, at the very least, this should have been a question for the jury: whether Defendant should be liable as an ordinary contractor (active negligence) or a general contractor (common work area exception). Instead, the lower courts ruled that as a matter of law, Defendant was a *de facto* general contractor. This cannot be and should not be Michigan law. This Court should grant Defendant's application for leave to appeal to determine whether and under what circumstances a non-general contractor can be held liable, notwithstanding *Ormsby*, under the common work area exception.

Response to the Instructional Error Issue (Issue II)

Plaintiff acknowledges that there are two components with this issue (Plaintiff's brief, 20). The first issue is whether the trial court erroneously instructed the jury in stating that the high degree of risk to a significant number of workers element can be satisfied so long as "employees of two or more subcontractors work in the area." As noted in Plaintiff's brief, the very next instructional subpart explained that a common work area "is defined as the same area

where two or more trades would eventually work" (Plaintiff's brief, 21). The trial court instructed the jury that the same basic fact could satisfy two elements.

Plaintiff tries to salvage the instruction by claiming that the instruction was consistent with the Court of Appeals' decision in *Hughes v PMG Bldg, Inc,* 227 Mich App 1, 6; 574 NW2d 691 (1997)(Plaintiff's brief, 22-23). However, page 6 of the *Hughes* decision was not a discussion of the significant number of workers element. *Id.* at 6. Instead, discussion of that element took place at pages 8 and 9 of the decision. *Id.* at 8-9. Moreover, the *Hughes* Court opined a significant number of workers would have to be exposed to the same danger—not merely the same location. *Id.*

Plaintiff cites Judge Warren's analysis for the proposition that "nowhere has the Court of Appeals defined the "common work area" element, itself, to include the additional requirement that the workers be exposed to the same danger" (Plaintiff's brief, 23). Again, it is unclear why Plaintiff is quoting "common work area" element discussion within the analysis of an issue limited to "significant number of workers" instruction. This is why there has been so much confusion below—the lower courts keep accepting Plaintiff's invitation to blur the elements. And, frankly, it is unclear that Judge Warren was even correct—as the *Hughes* decision certainly suggests that exposure to the same hazard is required for both the common work area element and the significant number of workers element. See *Hughes*, *supra* at 7-9. This Court expressly approved this *Hughes* discussion of the common work area element. *Ormsby*, *supra* at 57 n 9.

To his credit, Plaintiff eventually acknowledges that the instruction was erroneous (Plaintiff's brief, 23). Instead, Plaintiff contends that it was harmless error. However, Plaintiff does not address Defendant's law establishing that an erroneous instruction regarding the proofs required to establish an essential element is, by definition, an error requiring reversal. Cox v Bd

of Hosp Managers, 467 Mich 1, 14-15; 651 NW2d 256 (2002); Frye v Gilomen, 360 Mich 682, 687; 104 NW2d 813 (1960). This makes complete sense. The jury must be accurately instructed regarding what proofs will satisfy an element. This was clear, unfairly prejudicial error.

The second error involves how to determine the "significant number of workers" element, particularly as it relates to this Court's statement in *Ormsby t*hat the "high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Ormsby, supra* at 59 n 12. Plaintiff convinced Judge Warren to accept that this issue was resolved in *Latham I* by the Court of Appeals, ignoring the fact that this Court in *Latham II* reversed *Latham I* ("We therefore reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion."). Plaintiff cites no authority for a reversed ruling invoking the "law of the case doctrine."

Defendant reiterates that it stands alone in the Michigan Court of Appeals for being denied dispositive relief on the basis of *Ormsby* footnote 12. Defendant and Plaintiff raise opposing views regarding the policy that would support their respective positions. In support of Defendant's position, it cited *Alderman v JC Development Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010), where this Court reversed the Michigan Court of Appeals, which held that the significant number of workers element could include "workers at risk over the course of the project." Plaintiff does not even cite *Alderman*. At a minimum, the competing policy positions confirm that this Court should grant Defendant's application for leave to appeal, inviting amicus briefing by interested parties to resolve this issue.

⁴ Latham v Barton Malow Co ("Latham I"), unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 264243, issued October 17, 2006, rev'd by Latham v Barton Malow Co ("Latham II"), 480 Mich 105; 746 NW2d 868 (2008)

Response to the Dispositive Relief Issue (Issue III)5

At the outset, Defendant does not address the erroneous application of the "law of the case doctrine" below. As set forth in greater detail in Defendant's primary brief, every appellate ruling was in the context of a summary disposition motion and Plaintiff's entire theory of the case changed between the first summary disposition motion and the last summary disposition motion. The law of the case doctrine did not prevent the trial court from ruling on the merits of Defendant's dispositive motions. The lower courts erred in ruling to the contrary.

Turning to the elements at issue, Defendant's analysis focuses on the "common work area" and "high degree of risk to a significant number of workers" elements. Plaintiff hides his analysis of those elements at the end of his discussion, instead focusing on his proverbial "straw man" arguments. In fact, nowhere in any of the analysis of this issue does Plaintiff even cite, much less analyze or attempt to distinguish, this Court's decision in *Ormsby*!

Relative to the "common work area" element, Plaintiff claims that the element is controlled by the *Hughes* statement that "It is not necessary that other subcontractors work on the same site at the same time. The common work area rule merely requires that employees of two or more subcontractors will eventually work on the mezzanine" (Plaintiff's brief, 45). Plaintiff ignores the remainder of *Hughes*, which explained that workers must be exposed to the same danger for the common work area exception to apply. Plaintiff also ignores this Court's express approval of this discussion from *Hughes* in *Ormsby*. *Ormsby*, *supra* at 57 n 9. The *Ormsby* decision is Michigan law. The lower courts erred in accepting Plaintiff's invitation to ignore same. Applying *Ormsby* and *Hughes*, Defendant was entitled to summary disposition.

⁵ Defendant does not contest Plaintiff's explanation of the standard of review.

⁶ Brown v Drake Willock Int'l, 209 Mich App 136, 144; 530 NW2d 510 (1995); CAF Investment Co v Saginaw Twp, 410 Mich 428, 454; 302 NW2d 164 (1981).

Here, Plaintiff and his partner were working in isolation at the time of the incident. It was not a common work area. *Hughes, supra; Ormsby, supra*. Moreover, while Plaintiff's fall occurred while accessing the mezzanine by scissor lift, <u>Plaintiff's expert</u> conceded that Plaintiff did not require personal fall protection while <u>riding</u> the scissor lift (Tr IV, 173). The evidence was uncontroverted that <u>the other trades all accessed the elevations by ladder—which does not require fall protection</u> (Tr II, 148). Plaintiff even used a ladder to access the first elevation on this job site (Tr IV, 55, 71). Nobody else was exposed to the same danger as Plaintiff—accessing the mezzanine by scissor lift. This is further support for why the incident was not in a common work area, as the element has been defined by *Hughes* and *Ormsby*.

Instead, Plaintiff offered evidence that other trades worked on the mezzanine. But Plaintiff's expert further confirmed that no fall protection was required while Plaintiff was working on the mezzanine because it would "impede the work operation" (Tr IV, 177). So these workers were never exposed to any danger at all, much less the dangerous condition that Plaintiff contends he was exposed to. Plaintiff's evidence simply fails to establish that his injury occurred in a common work area.

For the same reasons, Plaintiff certainly did not establish that a significant number of workers were exposed to the same danger as him. On pages 43 and 44 of Plaintiff's brief, he lists trades that would have worked on the mezzanine. But, as noted above, the prior workers on the mezzanine accessed by ladder—thus, no fall protection was required for them to access (Tr II, 148) or work on the mezzanine (Tr IV, 177). There is no evidence that they accessed via a scissor lift, as Plaintiff did. Nevertheless, these workers were erroneously and unfairly counted as workers exposed to the same danger as Plaintiff. This is why Defendant should have been entitled to relief as a matter of law, either at the summary disposition stage, the directed verdict

stage, the post-verdict stage, or all three. And if this Court faithfully applies footnote 12 of *Ormsby*, then Plaintiff certainly failed to establish a material question of fact regarding this element. But even construed broadly, as set forth in greater detail in Defendant's primary brief, Plaintiff simply cannot satisfy the high degree of risk to a significant number of workers element. The above errors provide an opportunity for this Court to grant leave, allow amicus curiae briefing, and clarify the "common work area" exception elements for present and future parties.

Response to the Prior Appeal Issue (Issue IV)

In Latham IV, this Court denied leave to allow the trial in this matter to move forward, this Court correctly recognized that future appeal might be necessary. The lower courts have materially erred below, repeatedly blurring elements of the common work area exception. The policy issues in this appeal justify this Court having all authority to correct errors in Latham III. 7

CONCLUSION AND REQUEST FOR RELIEF

Defendant respectfully requests that this Honorable Court grant its application for leave to appeal, allow amicus briefing, clarify the common work area exception for the benefit of these parties and all future parties, and ultimately reverse the erroneous rulings below.

Respectfully submitted,

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Dated: May 27, 2014

⁷ Latham v Barton Malow Co ("Latham III"), unpublished per curiam opinion of the Michigan Court of Appeals (Docket No. 290268, issued December 7, 2010), rev'd by Latham v Barton Malow Co ("Latham IV"), 489 Mich 899, 796 NW2d 253 (2011).